LIBERTY ADVOCATE.

WHEN POWERS ARE ASSUMED WHICH HAVE NOT BEEN DELEGATED, A NULLIFICATION OF THE ACT IS THE RIGHTFUL REMEDY.—*Jefferson.*

MES J. GRAVES, Editor. LIBERTY, (MI.) TUESDAY, JANUARY 24, 1837. VOL. 2.—NO. 8.

e opinion of the High Court of Errors nd Appeals, delivered by his Hon. COTESWORTH P. SMITH, at the January Term 1837, in the cause of Francis Wren . . . Gayden on appeal rom the Superior Cour of Chancery.

n the case before us, the first question, ich we deem it proper to examine, ses upon the demurer of Gayden, the fendant below, to those parts of com-inants bill which seek to make him lia-e, as he alledges in his demurrer, upon s bonds as guardian of three of the mi-r children of Wiley Collins deceased. d also as security of Berry Collins upon r administration bond.

Gayden, who is one of the sureties of administratrix of Collins' estate, ortly after the grant of letters inter-rried with her and thus became pos-sed, as administrator in right of his fe, of the whole property of the defen-nt.

n 1813, as it appears from the state-nts of the bill, certain persons who as-ed to act by virtue of an order of the rphans Court of Wilkinson County, af-cted to make a division of the personal operty of the estate of Collins, which ll continued unadministered in the hands the admistrator. By this division whole property was distributed into e parts, one of which, amounting in val-to one third of the whole, was set aside Gayden who claimed the same in right his wife. The remaining four parts re assigned to the four surviving chil-en of the deceased. But anterior to is event the County of Amite had been rmed which embraced the property and e residence of all the parties. The pro-rty had in fact been located, and all the rties had continually resided at the me place from the date of the grant of ministration.

In the year following Gayden became, the appointment of the Orphans Court Amite County, guardian of Mahala llins now the wife of Francis Wren, of eatha Collins the wife of the complain-t Shropshire, and of James L. Collins, ho died in the year 1824, unmarried and ithout issue and executed bond as guar-ian of each respectively.

It appears that the whole of the proper-y which had been divided as before reci-ed, remained in the possession, and sub-ct to the controul, of Gayden down to 816. when he delivered to John Collins he share previously set apart for him at he division, and that in the years 1819 nd 1822 he delivered two more of the hares It further appears that the share, s before ascertained of James L. Collins, as delivered to him, but at what period is not stated.

The complainants, in their bill charge raud and wilful neglect on the part of Gayden in the discharge of his duties as dministrator, and pray that he may be compelled to account, as well as guardian f the parties before mentioned, as admin-strator of Wiley Collins' estate. From his rehearsal in part of the facts stated n the bill, it is obvious that, so far as Gay-en is sought to be charged in his charac-er of guardian, there is no privity of in-erest between the complainants, or legal ependence between the claims sought to e enforced. For Gayden having execu-ed separate guardian bonds he cannot be held responsible to the wards jointly.— His liabilities as guardian to a portion of the complainants are separate and inde-pendent, and most obviously so when pur-sued in the double capacity of guardian and administrator. A bill cannot join a demand for a debt due by an individual as an executor with one for a debt due by the same individual in his private charac-ter. 1 J. ch. 204. It is a well understood general rule that courts of equity, as well as courts of law, will not take cognizance of distinct and separate claims, or liabili-ties of different persons in one suit; and this though they stand in the same rela-tive situation, East 226, Mad. Rep. 89. In the case under consideration the relation of guardian and ward does not subsist be-tween the appellee and all of the persons joined as complainants in the bill. The demurrer, therefore, ought to have been sus-tained, at least to some extent. A further examination into the allegations and pray-er of the bill will enable us to find the ex-tent. The demurrer is applied to so much of the bill as seeks to make the defend-ant liable on his bond as security of Ber-ry Collins, and to such parts of the bill as seek to make him liable on his guardian bonds, and to Mahala Wren for the negro girl Mariann."

The demurrer was applied under a mis-conception of the allegations and prayer of the bill. Relief is not prayed against the defendant as security on the administration bonds. He is sued in the capacity of administrator, having acquired that character by the possession and controul of the intestates estate by marriage, nor can it be said that this suit is founded up-on any of the bonds in question, although they may constitute the evidence of the relations between the parties and form inducement to the action. In an action on the bond the verdict would be for damages alone; the specific property is sought in this proceeding.

There appears also to be a misception as to that part of the bill in relation to the slave Mariam, for there is no prayer to charge the defendant in respect to her.—eparate property is asserted on the part of Mahala to this negro, and it is charged as an act of bad faith in Gayden to have incorporated her with the distributive pro-perty of the deceased, as it is alledged he knew of the existence of her claim. If a separate right exists on the part of this complainant, her remedy must be in an-other forum. It appears probable that this incident could only have been intro-duced to give color to the charge of bad faith. The prayer of discovery in regard to Mariam is foreign to the bill. From this view of the subject the demurrer must be held to apply (and so far sustainable) to those portions of the bill which seek discovery in regard to Mariam, and which seek to make the appellee liable on his guardian bonds. The Chancellor should have dismissed thus far.

The questions arising upon the defend-ants plea of the Statute of Limitations as applicable to the state of facts disclosed by the bill are attend d with some embarrass-ment, surrounded as they are with diffi-culty and involved in uncertainty.

The relation which subsisted between the parties, complainant and defendant, are obviously of a trust character, and though direct in its nature cannot be said exactly to conform to the incidents of a purely technical trust, which is a crea-ture of a court of equity, and in no wise to be affected by the state of limitations. And as it is contended that the trust here is not purely of a technical character, although a direct, the allegations of the bill shew a state of facts which must make the statute applicable as a rule of decis-ision in this court.

It appears from the bill that letters of administration were granted to Mrs. Col-lins, the widow of the intestate, by the Orphans Court of Wilkinson county, in the latter part of the year 1804, and that the appellee shortly afterwards intermar-ried with her; thus acquiring the right of administration of the estate and to the possession of the intestates personal ef-fects, the whole of which went into his possession.

No account was rendered or settlement made with the court having cognizance of the matter by the administration ante-rior to her marriage with Gayden, or sub-sequently by Gayden and wife, or either of them.

It is also apparent that no valid parti-tion or distribution of the estate among the distributees was ever made; and it is expressly stated in complainants bill that Gayden, by his marriage with the admin-istratrix, and by virtue of the division before adverted to, claimed title to the fol-lowing slaves, viz:—Plim, Betty, Caroline, Frank, Mary and Sal: these slaves, con-stituting together with a feather bed, chest and trunk, the distributive portion assign-ed to him and wife at that division.

It is insisted that the relation of trust and *cisteque* trust was dissolved by the event above recited. That from the time Gayden claimed the property so set apart to him and wife in his own right, and con-sequently held adversely to any right which the distributees of Collins may have asserted to the same property, and that as the relation which had subsisted between the parties was not of a purely technical nature, and as a court of law hav-ing concurrent jurisdiction of the highest matter litigated in this suit, the statute of limitations should not be held to bar the recovery sought.

It is admitted that some of the incidents inherent in the origin of trusts of a purely technical character, do not attend the in-ception of the relation between the admin-istrator and the distributees of his intes-tates estate. Yet this reasoning must be considered unsatisfactory, if upon inquiry it shall be found that the trust continues to subsist between the administrator and distributee in case where he has not dis-charged himself of his trust duties by fully administering the effects of his intestates, and if there shall not exist at law a rem-edy effective to subserve the ends of justice.

For it appears to be well settled that courts of equity, where there is a compe-tent legal remedy and an equitable meth-od of redress with respect to the same subject matter, will apply the same stat-ute bar in the latter, which courts of law ought to interpose in the former; 2 Atkins, 240. Kane vs. Bloodgood, 7 J. ch. Rep. 90, Angel on limitations, 132. The right which courts of equity assume of enforc-ing the performance of the duties of ex-ecutors and administration, constitute a portion of the original jurisdiction, and it cannot be doubted that if the statute should not bar a recovery in this case, it is one properly cognizable in this court.— The true ground of jurisdiction here is the trust existing between the parties, administrators or trustees appointed by the law for the purpose of paying the debts of intestates and of making distri-bution; their very office is a trust; 1 P. Williams 249, do. 572. The statute of distributions, say the books, was intend-ed as the will of the intestate, and the *succession* to the person . . . as much fixed as the right of the heir to the real estate at common law; and on the ground of the trust in the administrator, Chancery assumed the power of compel-ling distribution, &c.; Couche vs. Savatin, 3 J. ch. R. 217.

By the Statute of this State, Rev. Code, p. 44, sec. 56, it is provided that the bond of the administrator may be put in suit *by any party* injured by a breach of its con-dition, and that it shall not become void upon the first recovery, but may be prose-cuted from time to time until the whole amount of the penalty shall be recovered.

The appellants therefore have by ex-press statutory provisions a legal remedy upon the bond for any direlection of duty on the part of Gayden, But it re-mains to be here whether the remedy thus afforded at law, was sufficiently ample to subserve the ends of justice.

It would appear to be a rule plainly de-ducible from the principle of adjudicated cases and sustained by the clearest con-viction of reason that when the remedy at law is cumulative and incomplete, that courts of equity should not adopt the statute as a rule of decision, which would be applicable in a suit at law for the same subject matter.

In the case before us the estate was nev-er finally settled, in fact no account was ever rendered by the administrator, and of consequence no valid partition or distri-bution could have been made binding on the distributees while minors. They could not have maintained an action of ac-count against Gayden, and it is equally manifest that he could not have been pur-sued in an action of detinue while the estate remained undivided and unsettled. Nor could either of the parties claiming distribution have maintained an action on the bond for his respective distributive share. The only proceeding then which they could have instituted at law was an action on the bond for a breach of the con-dition in which damages, coextensive with the bond, could alone have been recovered. Was this remedy complete, could it be said that full justice was attainable through that channel?

The complainants pray to be placed in possession of the slaves and other proper-ty of their deceased ancestor which had come into the hand of Gayden and it will readily be conceived that many circum-stances might concur to give to property of the former description a value in the eyes of the distributees which could not be estimated by a jury. It is not contended that such a conclusion necessarily arises out of the facts disclosed by the bill, nor would its assumption alone be sufficient to warrant this court in deciding the rem-edy at law incomplete. But other consid-erations tend strongly to this conclusion.

It was the duty of the Probate Judge to direct that the penalty of the bond should be sufficient to cover the full value of the estate, and it is presumed that this was done so far as the value of the Estate was known to the Judge at the period of the grant of letters. But it does not follow that the penalty of the bond, though sufficiently large at the date of its execution, was so nine years afterwards at the division before adverted to, when it is borne in mind that during this interve-ning time the whole property was possess-ed, and its entire proceeds appropriated by Gayden to his own purposes, and that it is alledged that Gayden stands indebted, as administrator, in the sum of $26.000 more than the penalty of the administra-tion bond. To this allegation some colour is given by the proofs taken before the Commissioner, and although there is no conclusive evidence that the penalty is inadequate, yet on the other hand, the pre-sumption is much weaker that the full amount of the penalty is adequate to cover the demands of the complainants. In the opinion of this Court, it is therefore not certain that the appellants have a complete remedy at law.

But assuming it as a general rule where a remedy is given at law in respect to a subject of litigation over which a Court of Chancery has primary jurisdiction, that the same limitation will be applied in Equity which would bar at law.

Yet it is contended that the circum-stances of this case bring it within the circle of those cases which have been held without the Statute of limitations.

The trust between the parties to this suit was express and direct, and is clearly distinguishable from those cases of trust which depend upon evidence or arise by implication of law. The rule in refer-ence to this latter class of trusts is under-stood to be well settled. Courts of Equity have invariably, in these cases, adopted the Statute as a rule of decision by anal-ogy to courts of law, and will refuse their aid where the legal remedy has been bar-ed. But in relation to express and direct trusts, as affected by the Statute, the rule does not appear to be so clearly defined or satisfactory settled. It is however clear that so long as there is a direct subsisting trust in a suit between the trustee and *cestueque* trust, the statute will not attach.

It is contended, and high authority is adduced in support of the proposition, that even in cases of technical and direct trusts, where the Trustee derives the right of *cestueque* trust, and assumes ab-solute ownership over the trust proper, the latter should not be allowed a remedy in Equity, beyond the period fixed for the recovery of legal estates at law; Angel on Limitation, 136; and in the case of Kane *vs.* Bloodgood, 7 J. ch., Rep. 124, the same doctrine is recognized. "So long", says the learned Chancellor who decided that case, "as the trust is a subsisting one, and admitted by the acts or declarations of the parties, no doubt, the Statute does not ap-ply but where such transactions take place between the Trustee and the *cestue-que* trust, as would in the case of tenants in common amount to an ouster of one of them by the other. I can hardly suppose that Courts of Chancery would consider lapse of time as of no consequence.— There is no good reason why the Statute of limitations should not apply to such a case (that is a case of direct trust) as to cases of constructive trusts and to cases of detected frauds, and to all other cases, where the statute is assumed as a rule of decision."

This position of Chancellor Kent, and which has been subsequently recognized by Mr. Angel, in his Treatise on Limita-tions, (p. 136) as sound doctrine, is not stated as a fixed rule of law, sustained by authority, but appears to be a deduction of his own, drawn from the application of the Statute to cases between tenants in common The case which the learned Chancellor was then investigating did not require the annunciation of this doctrine, nor is it apparent that the analogy which exists between tenants in common and a trustee and his *cest ieque* trust is sufficient-ly perfect to warrant such a conclusion, at least in the unqualified term in which it is stated. There is unquestionably a mutual trust between tenants in common, but it is not express or direct in its char-acter; each is seized in his own right of the whole estate, and the tenant in posses-sion so long as he does not hold adversely to his co-tenant is construed to be a trus-tee for the other; the possession of one is construed to be the possession of both, but in the case of a direct and express trust the trustee comes into possession origi-nally in that character. In the case be-fore us Gayden took possession of the ef-fects of Collins, as trustee for those enti-tled to the succession. It would probably be injustice to Chancellor Kent to suppose that he intended to lay it down as a gen-eral rule that in all cases of direct and technical trusts, where the trustee derives the right of his *cestueque* trust, and as-sumes absolute ownership, the statute should be held invariably to attach, but upon this foundation alone has Mr. Angel rested the validity of this principle; so far as I have been enabled to extend my re-searches, I have not found an adjudicated case where this doctrine is fully establish-ed.

In fact, the very definition of a techni-cal trust appears to militate against the truth of this doctrine. Lord Hardwick in Street *vs.* Millim, (2 Atkyns 610,) says that a trust is where there is such a con-fidence between the parties that no action at law will lie, but is merely a case for the consideration of a court of Chancery, and in the case of Sackey *vs.* Sackey, plea in Chancery 518, a technical trust is des-cribed to be a mere creature of a court of Equity, and not at all cognizable in a court of law; if it be true that a trust of this character is not at all cognizable in a court of law, but is a question which could only be entertained in equity, how is it it possible for the latter to adopt by analogy any salutary bar. The learned Chancellor himself, in a former part of his opinion, in the case of Kear *vs.* Blood-good, holds language irreconcilable with this principle, taken in the extended sense in which Mr. Angel has adopted it. He says a review of former decisions will en-able us, as I apprehend, to establish upon the solid foundations of authority and pol-icy, this rule, that the trusts intended by a court of Equity not to be reached or affec-ted by the statute of limitation, are those technical and continuing trusts which are not at all cognizable in a court of law, but fall within the proper, peculiar and extensive jurisdiction of a court of equity. This position, I apprehend cannot be cor-rect, if the rule laid down by Angel is true. It cannot be true that a trust falling with-in the proper, peculiar and *extensive* ju-risdiction of a court of equity, should be affected by the Statute and yet be brought within its operation by a denial of the right of the *cestueque* trust. The Statute of limitations do not apply in terms to any equitable demand; Stackhouse *vs.* Baniston, 10 Veesy 453. Yet it is ac-knowledged that Equity takes the same limitation in cases that are analogous to those in which it applies at law, but this application it is obvious cannot be made to those cases which lie within the exclu-sive jurisdiction of courts of equity, be-cause there is no point of analogy. The text therefore in Angel ought not to be considered authority, resting as it does solely on the dictum of Chancellor Kent.

After the most mature deliberation, which under the circumstances we have been enabled to bestow on this difficult and intricate question, we have come to this conclusion, that all causes of trust where 1. The trust is direct and express in its character; 2. Where the trust is direct and technical, and cognizable only in a court of equity; and 3. Where the right is litigated between the trustee and *cestueque* trust, are not within the statute of limitations.

It is also a well settled rule that where the trust subsists, being a direct one, the statute will not be adopted in Equity as a rule of decision, although a concurrent remedy may exist at law; Cholmondy *vs.* Clinton, 2 Mu. 360, 7 J. ch. R. (123.)

In England, the Statute does not apply in suits in Equity for the recovery of leg-acies and distributive shares for the rea-son that no remedy exists at law, but it becomes a matter of serious question whether we are not bound to modify this rule in consequence of there having been a remedy provided at law in this State.

Once the subject of Executors and Ad-ministrators Equity possessed original and conclusive jurisdiction, and it is con-tended this as the remedy given at law, for the enforcement of their duties is cumula-tive, Equity ought not to apply the Statute bar, which would attach in a suit at law against them.

And it would appear that this view of the question has been adopted in the State of New York. In the case of Arden *vs.* Arden, (1 J. ch. Rep. 316,) it was held there was no legal bar by force of the Statute of limitations to legacy. In the case of De Couche *vs.* Lavatier, (3 G. ch. R. 216) the same doctrine is expressly recognized.

The learned Chancellor says, "The administrator, though he may plead the Statute as against a creditor, can never plead the Statute as a bar to a legacy, and by purity of reason it would not be appli-cable in a suit for a distributive share."

In the State of South Carolina the same doctrine has been maintained; 4 *Dess aus-sare*, Reps. 439; it was decided that the Statute did not apply to a suit in Equity against the Executor for a legacy. This case is a very strong one, for the suit was not instituted until after final settlement of the Estate and delivery to the heirs.

If these decisions are maintainable on principles of reason and authority, the objection to the application of the Statute in a suit against the administrator of an unsettled Estate must recur with increased force.

It is said that it cannot be known when the Executor is bound to pay the legacies, as they are payable when the Executor shall have possessed effects sufficient to pay the debts which may be at an indefi-nite period, & that therefore no time can be fixed at which the Statute will commence to run.

If this be the true reason of the will in relation to legacies, it must apply with full force in a suit brought in Equity, for the purpose of compelling an administra-tor to account and pay over the Estate to them entitled to it. For the obvious rea-son that the distributee could not at law leave his action for a distributive share un-til after settlement, although he might maintain an action on the administration bond for breach of the condition.

In the case of an unsettled administra-tion, the trust remains unexecuted, and must, therefore, we apprehend, be regar-ded as subsisting between the Trustee "*cestueque* trust," and can alone be sus-tained as between them by *bona fide* exe-cution on the trust. But if the trust sub-sists, no doubt can exist that the Statute will not attach.

In the case before us, Gayden came into the Estate of the deceased, as administra-tor, by virtue of his marriage with the administratrix.

He was therefore the Trustee for those entitled to the succession, his office was a trust, and he could take it in no other capacity, he failed wholly to dis-charge the duties which the law had im-posed upon him in that character, he did not even render an account or settle in any respect with the Orphans' Court, and of consequence there could not have been a legal distribution of the Estate.

If Gayden had any right to a part of the Estate which he held as administrator, it was a joint interest with the other dis-tributees, and did not authorize him to as-sume a distinct and separate title to any specific chattel or separate portion of the trust fund; the case would have presented a different aspect had there been a decree setting apart to him the distributive share to which his wife may have been entitled, for as to the part thus decreed to him, he would have held not as Trustee, but in his individual character. The trust rela-tion, so far, would have ceased to exist. But by his own act, or rather by gross neglect of duty, injurious to his *cestueque* trust and beneficial to himself, he has pla-ced the complainants in such a situation that it is at least very doubtful whether in a suit at law, full and complete justice could be obtained, and now asks of the